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No. 98-302

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In The

Supreme Court of the United States

October Term, 1997

AIRBORNE FREIGHT CORPORATION
d/b/a AIRBORNE EXPRESS,
Petitioner,

v.

JOHN M. KELLEY,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The First Circuit

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant certiorari to determine whether, under the facts of this age discrimination case, the absence of a business judgment instruction constituted prejudicial error under federal law where the First Circuit correctly recognized that the judgment would stand on independent state law grounds regardless of the answer to that inquiry?

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The opinion in this case is reported at 140 F.3d 335 (1st Cir. 1998). A previous opinion of the First Circuit was withdrawn in accordance with Internal Operating Procedure ("IOP") X.D of the First Circuit upon consideration of the Respondent's Suggestion for Rehearing En Banc.

STATUTES INVOLVED

Judgment in this matter was entered pursuant to the ADEA and Massachusetts General Laws Chapter 151B. Airborne recognizes that the judgment at issue is in the amount of $3,136,858 which is the judgment that was entered pursuant to the state statute.

M.G.L. c. 151B, § 4

It shall be an unlawful practice:

> 1B. For an employer in the private sector, by himself or his agent, because of the age of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

INTRODUCTION

The question presented in Airborne's Petition is not raised by the decision or the record below. Airborne raises the question of whether a business judgment instruction is always necessary in a case brought pursuant to the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* However, the judgment at issue was entered

pursuant to Massachusetts General Laws Chapter 151B thereby rendering immaterial questions pertaining to the ADEA judgment.

As detailed below, there is no cause for this Court to review whether the Massachusetts statute requires that such an instruction be given. *See, pp.* 14-16, *infra.* The contention was rejected by the District Court and by a unanimous decision of a panel of the First Circuit. Moreover, the panel circulated the opinion to the other judges of the First Circuit "for pre-publication comment, none of whom objected to it." 48A, n. 15.[1] Thereafter, Airborne filed a Suggestion for Rehearing En Banc which was denied. 65A.

Even if this case did not stand on independent state law grounds, certiorari would be unwarranted. There does not exist an intolerable conflict among the circuits which have considered whether the absence of a business judgment instruction constitutes reversible error. All circuits that have considered the issue agree that the absence of a business judgment instruction does not require reversal and that courts must examine the facts of each particular case. *See, pp.* 16-19, *infra.*

STATEMENT OF THE CASE

Airborne has greatly misstated the facts of this case. Consequently, Kelley is forced to correct these misrepresentations herein. Supreme Court Rule 15. However, Airborne's petition should be denied without regard to these factual disputes because the judgment which Kelley seeks to collect was entered pursuant to Massachusetts state law.

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[1] Citations to the Joint Appendix filed with the First Circuit appear herein as "A. ___." Citations to Airborne's Petition appear herein as "P. ___." Citations to the Appendix to Airborne's Petition appear herein as "___ A."

A. Airborne Misrepresents the Statute at Issue in this Proceeding.

Airborne recognizes that the judgment at issue is a "multi-million dollar" jury verdict in the amount of $3,136,858. P. 2, 7. That judgment was entered pursuant to the Massachusetts statute on Count II of the complaint. 2A. A separate judgment under Count I of the complaint was entered on the ADEA claim in a lesser amount ($1,244,152) due to the significant differences in the remedial provisions of the ADEA and M.G.L. c. 151B and the way in which the two statutes are interpreted. 2A. Nevertheless, Airborne does not make even a passing reference to M.G.L. C. 151B in the section of its Petition entitled "Statutes Involved." P. 1-2.

The reason for the omission is clear. Since the judgment at issue was entered pursuant to Massachusetts law, Airborne's professed concerns about the judgment entered pursuant to the ADEA are immaterial and the question presented by Airborne is not raised by this case.

B. Airborne Misrepresents that There Was Uncontradicted Evidence that Guiod and Kelley "Hated Each Others' Guts."

As set forth below, Airborne's truncated summary of the evidence is a gross distortion of the presentation of Kelley's case and Airborne's defense. For instance, while the termination letter given to Kelley listed a multitude of reasons for terminating Kelley, all of which Airborne attempted to support at trial, Airborne refers to only one reason for discharging Kelley in its Petition -- Kelley's alleged inability to work cooperatively with the sales arm of Airborne

and, in particular, James Guiod, Kelley's counterpart on the sales side of the business.[2]

In its Petition, Airborne argues that "the uncontradicted evidence at trial established that Guiod and Kelley 'hated each others' guts.'" P. 4. This statement is a misrepresentation on multiple levels. First, the quotation set forth (i.e. "hated each others' guts") does not even appear in the record. The exhibit cited by Airborne was an E-Mail from Raymond Van Bruwaene, Executive Vice President of Field Services, in which he wrote not that Guiod and Kelley hated each others' guts but rather that "Guiod hates Kelley's guts..." A. 2315.

In addition to being inaccurately quoted, the statement was not "uncontradicted." Guiod, himself, stated: "I did not hate Mike Kelley . . ." A. 1617. Van Bruwaene also contradicted what Airborne erroneously referred to as the "uncontradicted" fact. Van Bruwaene testified that "I shouldn't have said it, because I did not know it for a fact, if Mr. Guiod hated Mr. Kelley's guts." A. 1065.

As will be set forth below, the unreliability of Airborne's Petition, evidenced by the foregoing misrepresentations, has placed a heavy burden on Kelley to set the record straight.[3]

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[2] Despite this alleged inability to work cooperatively, Kelley and Guiod won four "Top Gun" awards together -- more than any other sales/service team in the company. A. 2189-92.

[3] Airborne has made other misrepresentations which are innocuous but prove that Airborne has not taken seriously its responsibility to portray the record accurately. For instance, Airborne states: "At the time he was terminated by Airborne, Kelley was one of five Regional Field Services Managers ("RFSM"). P. 3. In fact, Kelley was one of thirteen RFSMs. A. 1079. He was one of five RFSMs reporting directly to William Simpson, Vice President of Field Services for Area 1.

C. The Petitioner Misrepresents Kelley's Case Presentation and the Record.

1. Kelley's Presentation of the Case

Kelley was the Northeast Regional Field Services Manager ("RFSM") for Airborne and answered directly to William Simpson who was an Area Vice President. Simpson supervised four other RFSMs in addition to Kelley. In December, 1992, Kelley was given the *highest rating* of any RFSM working under Simpson. A. 948. The rating was not merely subjective. Airborne kept many types of statistics to measure the performance of people in Kelley's position. Kelley had outperformed the other RFSMs in Simpson's area in these measured statistics which included so-called "Quality of Service" audits. A. 2205. In the December, 1992 performance review, Simpson wrote: ". . .Service is at an all time high in the region." A. 1439; 2148. Simpson's comments appeared in the section of the appraisal form where Richard Goodwin, Vice President of Human Resources, testified that he would have expected to see an indication that Kelley would be terminated in ninety days.[4] A. 1155.

In March, 1993, Kelley spoke with Simpson about the possibility of being promoted to Vice President. A.657. On March 24, 1993, Simpson delivered a termination letter to Kelley discharging him from his employment purportedly for

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[4] Airborne also misrepresents the history of Kelley's performance. Airborne argues that it "presented evidence that Kelley's performance had been inconsistent during the previous several years." P. 4 In fact, Airborne had also rated Kelley as a superior employee in 1991 and although he was criticized at the beginning of 1990, by the end of the year, Simpson reported that Kelley's region had made "remarkable progress" in all areas. Thus, for more than two years prior to his discharge in March, 1993, Kelley's performance had been consistently superior. A. 2139; 2140-42.

a broad ranging list of inadequacies in his performance -- none of which appeared in his glowing evaluation from only three months earlier. A. 660-61; 2125-26.

In its Petition, Airborne misrepresents that the sole reason advanced by Airborne for Kelley's discharge was a breakdown in his relationship with sales caused by customer complaints.[5] The termination letter listed a multitude of other purported deficiencies in Kelley's performance which were easily dismissed as outright lies and which Airborne deliberately does not bring to the attention of this Court.

For example, in the termination letter Simpson assailed Kelley for procrastinating in following instructions, for not enforcing company sexual harassment policies, and for management judgments which were allegedly so bad that an anonymous letter about Kelley had been written to the President of Airborne. Simpson also assailed Kelley for being "bullish." A. 2125-26.

The reasons given for the discharge in the termination letter were outright lies. Simpson admitted that sexual harassment was not an issue in Kelley's region. A. 1262. Moreover, Simpson knew prior to the decision to discharge Kelley was made that the allegations in the so-called "anonymous letter" had no merit because he sent a retired FBI agent to conduct an investigation and the FBI agent reported that the allegations contained in the *anonymous* letter were groundless. A. 1473.

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[5] Airborne argues that it "explained" to the jury that in March, 1993, Simpson reached the conclusion that the relationship between sales and service was irreparable. P. 4. The explanation was given by Simpson. Of course, the jury did not have to credit Simpson's explanation and there was good reason to suspect that Simpson was lying. The District Court noted, in a post-trial hearing, that "Mr. Simpson and Mr. Goodwin [tried] to portray to the jury a scenario simply contrary to fact." A. 2076.

In attempting to convince the jury that customers were outraged at Kelley's performance, Airborne witnesses repeatedly referred to the Thomas Cook Travel Agency account as the example of Kelley's purported inability to service customers. As with so many other "facts" asserted by Airborne at trial and in its brief, Airborne's own internal E-mail communications undermined its witnesses' testimony about the Thomas Cook account. The E-Mail, written by Simpson, disclosed that the Thomas Cook account was experiencing problems which threatened the relationship between Airborne and Thomas Cook. The problems were concentrated in five geographic areas -- none of which were in Kelley's region. A. 1394-95; 2255.

In the termination letter, Simpson assailed Kelley for customer problems and poor relationship with the sales side of the business for the entire period of his tenure as RFSM of the Northeast Region which dated back six years. Nevertheless, Kelley had received superior performance ratings in his last two annual reviews and was not chastised for poor relationship with sales and/or customers in either. A. 2140-42; 2146-48.

Over ten days of trial Airborne's witnesses repeatedly lied. It is impractical to recite here the scenarios in which it was apparent that Airborne's witnesses were lying about the reasons for Kelley's discharge. However, the words of the experienced District Court Judge who presided over the case, made in connection with a post-trial hearing, prove the point:

> . . . I believe that the scenario for discharging the plaintiff was deliberate, false, contrived and concealed from the jury and the Court. I found the testimony of the officers who came on here from Seattle to be, generally speaking, on key points, lacking in credibility . . . Time and time again, I found the statements of the principal witnesses for the defendants to be

> contrary to -- contrary not only to other reliable evidence, but approaching contrary to common sense . . . A. 1965-1966.

The District Court also stated in post-trial hearings that Airborne's description of events was "absolutely unreliable," A. 2074, and "contrived." A. 2078.

The District Court was not alone in its assessment of Airborne's lack of candor. After carefully reviewing the 2,500 page record, the First Circuit wrote:

> In short, Airborne's witnesses proffered a version of events that often seemed in conflict with other evidence adduced at trial, and they contradicted each other in attempting to explain Kelley's dismissal. 14A.

Kelley presented evidence which had a direct bearing on the issue of age discrimination. In particular, Kelley testified that the decision maker, Simpson, stated approximately nine months prior to Kelley's discharge that a proposed reduction in force presented "an excellent opportunity to get rid of some of the older mediocre managers." A. 782. In addition, Kelley testified that the Vice President of Human Resources, Richard Goodwin, stated that age would be one factor considered in deciding who to terminate. A. 781. The oldest person in Kelley's region was terminated as a result of

the reduction in force. He was in his mid to late forties.[6] A. 782.

Airborne argues that this evidence was uncorroborated. Because Airborne's witnesses obviously lied throughout the trial, it is inappropriate for Airborne to continue to argue the evidence in a light most favorable to itself -- leaving aside that such arguments also flaunt well-settled principles of appellate review of jury verdicts. Moreover, Airborne did not even dare to ask Van Bruwaene whether the discriminatory statements were made despite the fact that he was present at the meeting where they were uttered. A. 780.

Kelley also presented unrebutted evidence that while his request to be elevated to Vice President was met with a letter of discharge, Jack Bunyan, another RFSM working under Simpson, whose statistical ratings had been inferior to Kelley's, was promoted to Vice President after Kelley's discharge. A. 635; 657; 1178; 2193; 2194-2195; 2276. Bunyan was in his thirties at the time.[7] A. 1178. In addition, Kelley's replacement was in his thirties. A. 232.

Among other evidence relative to Airborne's state of mind, Kelley introduced into evidence, without objection, an E-Mail relating to Kelley's prospective termination in which Van Bruwaene stated "hopefully we have enough data to

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[6] Airborne also misrepresents the First Circuit's finding regarding evidence which directly indicated age bias. The First Circuit held that the evidence of discriminatory statements made by Simpson "had a direct bearing on age discrimination because Simpson made the decision to terminate Kelley." The First Circuit also held that since Goodwin was in charge of the company's discrimination policy and "participated closely" in Kelley's termination, his comments evidenced a discriminatory atmosphere. 23A.

[7] This fact undermines Airborne's misrepresentation that there was no evidence that similarly situated management employees were treated differently from Kelley.

avoid a wrongful discharge," A. 2315, which Van Bruwaene testified encompassed age discrimination. A. 1144.

This evidence was sufficient to support the jury's express answer to a special interrogatory that age was a determinative factor in the decision to discharge Kelley. In fact, in its Reply Brief filed at the First Circuit, Airborne admitted that the evidence was sufficient to support the verdict which, of course, includes the jury's specific "age" finding. *Airborne's Reply Brief* at 2, n. 1 ("Airborne is not arguing sufficiency of the evidence").

Airborne has recast Kelley's evidence, presented over the course of a ten day trial, and reduced its version of Kelley's evidence to a solitary paragraph in its Petition. Airborne argues in that paragraph that Kelley's "presentation to the jury emphasized . . . that Airborne had not followed its progressive disciplinary guidelines to address his performance problems during the winter of 1993, and that he had not been warned that his job was in jeopardy." P. 3. Kelley did not emphasize either of these points. In fact, neither point was even raised in Kelley's closing argument.

In addition to evidence of age bias, Kelley's presentation consisted of demonstrating that his performance remained excellent in 1993 and that Airborne simply made up reasons for the discharge to disguise the real discriminatory motive. Progressive discipline or even a warning was unnecessary because the true reason for Kelley's discharge was his age -- an attribute which could not be altered through progressive discipline.

2. Airborne Misrepresents Kelley's Closing Argument.

Airborne misrepresents Kelley's closing argument. Airborne states that "Kelley's counsel argued to the jury that [Kelley's] termination was 'wrongful' and 'messy'." P. 3. In actuality, Kelley's counsel merely reminded the jury about

what Van Bruwaene had written prophetically about Kelley's termination in two E-Mail messages which were admitted into evidence without objection. A.1056; 1895; 2315; 2371. Airborne likewise takes other isolated words and phrases out of context to attempt to create the impression that Kelley's counsel did not argue in accordance with the District Court's age discrimination instructions. That charge simply is not true.

Kelley's counsel remained true to age discrimination concepts. He argued that the multitude of reasons for the termination concocted by Goodwin and Simpson were obvious pretext. He reminded the jury of the various ways in which Airborne's executives were exposed as liars. Kelley's counsel concurrently reminded the jury about the evidence of age discrimination including the discriminatory statements made by Simpson and Goodwin in connection with the reduction in force, the fact that the oldest person in Kelley's district (mid to late forties) was terminated as a result of the reduction in force, and the fact that Kelley was replaced by a person in his thirties. Kelley's counsel reminded the jury that "this is an age discrimination case," A. 1868, that "we're talking about age here," A. 1878, and asked the jury to tell Airborne that "there was discrimination as a determining factor in the case." A. 1895.

Airborne also omits to mention that Kelley's counsel warned the jury that no matter what he said, "what the judge tells you the law is, you have to abide by." A. 1867.

3. Airborne Misrepresents the District Court's Questioning of Witnesses.

Over the course of the ten day trial, the District Court occasionally made inquiries of witnesses for both the plaintiff and defendant. Airborne never objected at trial to the District Court's questioning, either in the presence of the jury or at some later point. Airborne did not raise the issue of the

District Court's questioning of witnesses in its post-trial motions.

On appeal, Airborne argued for the first time that the District Court's questioning suggested that Airborne's business judgment could be second-guessed. In an unfair ambush on the District Court, Airborne took a series of questions asked by the District Court out of context and cut and pasted the colloquy together in a way that it hoped would support its argument since the actual record did not. Airborne even argued that the District Court "refused" to allow the witness to have the last word. In fact, the witness not only had the last word but agreed with the District Court. A. 1351-53. Airborne employed the same technique with another question asked by the District Court.

In its Petition, Airborne has further reduced the District Court's colloquy with the witness thereby placing it even further out of context. Footnote three of the Petition is a gross mischaracterization of the District Court's questioning of the witness and the significance of that questioning in the context of the ten day trial. The District Court never suggested that the jury was free to base liability on disagreement with Airborne's business judgment. To the contrary, the District Court emphasized to the jury that Airborne was free to discharge Kelley for any reason at all so long as it was not discriminatory -- a fact which Airborne conspicuously omits to bring to the attention of this Court. A. 1183-1184.

4. The Petitioner Misrepresents the Nature of the Jury Verdict.

The jury was given special interrogatories to answer but Airborne does not advise the Court of that important fact. The jury was asked whether age was a determinative influence in the decision to discharge Kelley. A. 268. It answered that question affirmatively. A. 268. Although the jury was given a special interrogatory which permitted it to render a

verdict for Kelley on pretext alone if Kelley had not convinced the jurors that the ultimate motive for the discharge was his age (as permitted by Massachusetts law), the jury did not do so. It actually found "discriminatory animus." 26A, n. 2.

Since the jury based its verdict on evidence of age animus, Airborne's argument that the verdict was based on pretext is flatly wrong. The First Circuit recognized this fact when it wrote:

> Here, the jury affirmatively responded on the jury verdict form that age had a determinative influence on Airborne's decision to terminate Kelley and thus did not premise its liability on a finding of pretext alone. 26A, n.2.

Unable to explain the contradiction between the jury's express finding and its argument, Airborne simply chose to ignore the answer to special interrogatories in its Petition.

5. Airborne Misrepresents Kelley's Suggestion for Rehearing En Banc and the First Circuit's Holding.

Airborne argues that Kelley's Suggestion for Rehearing En Banc raised arguments that "were novel and contradictory to Kelley's previous positions as stated in his initial briefs (sic)." P. 9, n. 5. This statement is false. Upon reviewing the original opinion in this case, it was clear to counsel that the First Circuit had been misled by the misrepresentations of the record made by Airborne. Kelley pointed out the errors in the opinion and argued, *inter alia*, that the First Circuit had not reviewed the record as a whole to determine whether the business judgment instruction would have made a difference in light of the evidence, the jury instructions, and the answer to the special interrogatories.

Kelley asserted that the failure to do so violated his Seventh Amendment right to a jury determination.

The First Circuit spent an additional six months reviewing the record of the ten day, fact-intensive trial. The truncated original opinion was withdrawn and replaced by a comprehensive opinion with record references demonstrating that the First Circuit had ultimately devoted substantial time to reviewing the record as a whole. The three judge panel reversed itself unanimously. As settled principles of appellate review of jury instructions dictate, the First Circuit reviewed the instructions as a whole and concluded that the jury had been properly guided by the District Court and that the answer to the special interrogatories foreclosed any possibility that the business judgment instruction would have made a difference in the facts of this particular case. 30A-32A.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS CASE INVOLVES A MASSACHUSETTS STATUTE AND THUS NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION PRESENTED IN THE PETITION.

The sole question presented by Airborne is whether a District Court's decision not to give a business judgment instruction violates the purpose and intent of Congress in enacting the ADEA. P. i. However, Airborne acknowledges that the judgment at issue is one in the amount of $3,136,858 which was entered pursuant to the Massachusetts statute and not pursuant to the ADEA. 2A.

Airborne argues in a footnote that Massachusetts law requires that a business judgment instruction be given.[8] P. 19, n. 10. Airborne cites no Massachusetts authority for that proposition. Neither *Matthews v. Ocean Spray Cranberries, Inc.*, 426 Mass. 122, 686 N.E.2d 1303 (1997) nor *Smith College v. MCAD*, 376 Mass. 221, 380 N.E.2d 121 (1978), cited by Airborne, even involve jury trials. Consequently, they do not involve jury instructions.[9] With respect to the

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[8] Airborne also argues in a footnote that "the First Circuit completely disregards the fact that the trial court specifically directed the jury that its finding on federal law was dispositive of the state law claim." P. 10, n. 6. This statement misrepresents the District Court's instructions and the decision of the First Circuit.

The District Court instructed the jury that if it actually found age to be a determinative factor in the decision to discharge, Kelley had carried his burden under both state and federal law. The District Court continued that if the jury did not find that age was a determinative factor in the decision to discharge, it should enter judgment for Airborne on the federal count but should consider whether Airborne's reasons were pretext in which case judgment would be appropriate without a specific age finding under the state statute.

The First Circuit did not disregard these instructions in rendering its decision. To the contrary, the First Circuit provided a detailed recitation of the jury instructions and specifically took into consideration the District Court's explanation of the special verdict form. In that regard, the First Circuit wrote: "If the jury answered Question 2 affirmatively, this finding was sufficient to enter judgment on both state and federal claims." 16A.

As set forth herein, the jury's express finding that Kelley's age was a motivating factor for his discharge rules out any possibility that the jury rendered a verdict based on disagreement with Airborne's business judgment and the First Circuit so held. 30A-32A.

[9] The Massachusetts statute is interpreted significantly differently than the ADEA. For instance, Massachusetts is a pretext only jurisdiction, *Blare v. Husky Injection Moldings System Boston, Inc.*, 419 Mass. 437,

state law claim, the First Circuit correctly concluded that "the absence of the business judgment instruction has no effect on the defendant's liability under ch. 151B." 33A. Since the First Circuit's decision rests on an adequate state law ground, the Court should not grant a writ of certiorari. *Wilson v. Loews Incorporated*, 355 U.S. 597, 598 (1958)(writ dismissed as improvidently granted because the judgment rested on an adequate state ground); *Colorado v. Nunez*, 465 U.S. 324 (1984)(same).

II. THE DECISION OF THE FIRST CIRCUIT IS NOT IN AN INTOLERABLE CONFLICT WITH THE EIGHTH CIRCUIT DECISION IN STEMMONS.

Based on the adequate state law ground for the judgment, certiorari is unwarranted. However, even if the ADEA was at issue, there is no meaningful conflict among the circuits. Both the First Circuit and the Eighth Circuit review the record as a whole to determine whether the absence of a business judgment instruction made a difference in the outcome of the case. Certainly, this does not constitute an intolerable conflict which deserves the attention of this Court.

In this case, the First Circuit was properly concerned with determining whether the absence of a business judgment instruction undermined the jury charge on the whole and took the jury's focus away from the governing principles of age discrimination. The First Circuit reviewed the record to determine whether a business judgment instruction under the facts of this particular case would have made a difference.

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646 N.E.2d 111 (1995), front pay is considered compensatory rather than equitable, *Conway v. Electro Switch Corp.*, 402 Mass. 385, 523 N.E.2d 255 (1988), and emotional distress is an available remedy. *Fontaine v. Ebtec Corp.*, 415 Mass. 309, 613 N.E.2d 881 (1993).

Critical to the First Circuit's reasoning was the fact that the jury answered a special interrogatory that age was a determinative factor in the decision to discharge Kelley. The First Circuit recognized that there was evidence to support the special finding and stated that it could not:

> . . .see how the jury could have thought it was free to find that age had a determinative influence on Kelley's discharge if it merely disagreed with Airborne's business judgment. The district court instructed the jury, on more than one occasion, that Kelley could prevail on his federal claim only if he proved by a preponderance of the evidence that he would not have been fired but for his age. 30A.

In reviewing the jury charge as a whole, the First Circuit wrote:

> These instructions did not permit or suggest that the jury could predicate a finding of age discrimination on their disagreement with Airborne's business judgment. 32A.

Finally, the First Circuit noted that the District Court properly focused the jury's inquiry on Airborne's state of mind at the time that the decision to discharge was made. 32A.

The First Circuit *did not* hold that it would be error to give a business judgment instruction.

Airborne asserts that the First Circuit's opinion is in conflict with Eighth Circuit jurisprudence set forth in *Stemmons v. Missouri Department of Corrections*, 82 F.3d 817 (8th Cir. 1996).[10] In that case, the Eighth Circuit held

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[10] *Thornley v. Penton Publishing Inc.*, 104 F.3d 26 (2nd Cir. 1997), cited by Airborne, is inapposite. That case does not involve a request

that a business judgment instruction should be given but that review of the record is necessary to see whether its absence affected the outcome of the case. *Id.* at 820. In *Stemmons*, the Eighth Circuit held that the absence of the business judgment instruction did not affect the outcome of the case and affirmed the jury verdict. *Id.* at 820.

Airborne argues that the Eighth Circuit found the absence of a business judgment instruction to be harmless only because there was evidence that suggested discriminatory animus. Airborne misrepresents the holding in *Stemmons*. In fact, the Eighth Circuit held:

> All of this evidence tends to undermine the department's proffered reason for denying Ms. Stemmons a promotion, and thus to establish that it was a *pretext*. In light of this evidence, moreover, we believe that the district court's failure to give a business judgment instruction was harmless error.

Id. at 821 (emphasis added).

The Eighth Circuit distinguished its prior holding in *Walker v. AT & T Technologies*, 995 F.2d 846 (8th Cir. 1993)(holding that the absence of the business judgment instruction was prejudicial) on the grounds that the plaintiff's evidence in *Walker* consisted primarily of the testimony of

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for a business judgment instruction. Rather, the Second Circuit held that it was error for the District Court to instruct the jury that plaintiff needed only to demonstrate that he was meeting the job qualifications of a *reasonable employer* as opposed to the actual expectations of the defendant. This instruction mandated reversal because it improperly stated the elements of the prima facie case. As set forth above, the First Circuit held that the District Court's instructions were correct on the principles governing employment discrimination.

co-workers who indicated that the plaintiff was the most qualified candidate for promotion. In fact, the evidence consisted of testimony by these other employees that they disagreed with the employer's decision. *Id.* at 850. Thus, the facts in *Walker* are different from those in *Stemmons* and the present case because in *Walker* there was no evidence of discriminatory animus and no evidence which undermined the defendant's credibility. *Stemmons*, 82 F.3d at 821.[11]

In *Stemmons*, the Eighth Circuit was satisfied that the business judgment instruction would not have made a difference, in part, because the defendant advised the jury of the business judgment rule in its closing argument. Airborne also advised the jury of the business judgment rule in its closing argument. A. 1865; 15A.

Two important facts which were present in the case at bar and do not appear to have existed in the *Stemmons* case are: (1) the jury in this case answered special interrogatories; and (2) the judge emphasized to the jury that Kelley could be discharged for any reason or no reason so long as it was not discriminatory. A. 1183-1184. All of these facts compel the conclusion that the jury verdict would not have changed if the requested instruction had been given.

There does not exist an intolerable conflict between the First and Eighth Circuits. Even if the ADEA judgment was at issue, the judgment would withstand Airborne's attack even under *Stemmons*. Of course, all of these arguments are irrelevant because of the adequate state law grounds for the verdict.

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[11] In *Walker*, the employer's reason for not promoting the employee was that it felt that another candidate for promotion was a "little bit better." *Walker*, 995 F.2d at 847.

III. THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER THE ABSENCE OF A BUSINESS JUDGMENT INSTRUCTION WAS HARMLESS.

The First Circuit and the Eighth Circuit agree that the absence of a business judgment instruction does not require reversal of a jury verdict. Consequently, this Court is being asked to review a 2,500 page record developed over the course of a ten day trial for the purpose of determining whether a three judge panel, which already reviewed the case twice, reached the correct conclusion that the jury's answer to the special interrogatory would not have changed if the instruction had been given. This Court has stated: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also, Texas v. Mead*, 465 U.S. 1041 (1984).

IV. THE FIRST CIRCUIT'S OPINION THAT THE JURY'S EXPRESS FINDING OF AGE DISCRIMINATION COULD NOT HAVE BEEN BASED ON DISAGREEMENT WITH AIRBORNE'S BUSINESS JUDGMENT WAS CORRECT.

There are two ways for a plaintiff to prove that he was the victim of unlawful discrimination. He may produce direct evidence of discrimination or he may indirectly prove discrimination by showing pretext. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

In the present case, Kelley introduced evidence which had a direct bearing on the issue of age animus. This included Simpson's age biased statement made in connection with the reduction in force, Goodwin's statements regarding the same subject matter, the discharge of the oldest person in

Kelley's region as a result of the reduction in force, the promotion of Bunyan to Vice President, the discharge of Kelley only weeks after a request to be made Vice President, and the replacement of Kelley by a thirty-seven year old. On this evidence, the jury accepted Kelley's explanation that he had been discharged because of his age.

The District Court devised a special verdict form which, when answered, disclosed whether the jury actually found evidence of age discrimination or whether the jury's verdict was based solely on its disbelief of the reasons asserted by Airborne. The first question asked:

> Has plaintiff proved that, at the time of his termination, he was performing his job sufficiently well to meet defendant's legitimate expectations?[12]

The jury answered "yes." The second interrogatory asked:

> If "yes" to question (1), has plaintiff proved that his age had a determinative influence on defendant's decision to discharge him?
>
> N.B. IF "YES," ENTER VERDICTS FOR THE PLAINTIFF ON BOTH COUNTS I AND II AND PROCEED DIRECTLY TO QUESTIONS (4a) AND (4b).

The jury answered "yes." The third interrogatory asked:

> If "no" to question (2), has plaintiff nonetheless proved that the reasons for discharge stated in the March 24, 1993 discharge letter

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[12] Airborne stipulated to the existence of the other elements of the prima facie case.

were pretextual -- i.e., that they were intended to mask *some other*, unstated reason for the discharge? [emphasis added].

N.B. IF "YES," ENTER A VERDICT FOR THE PLAINTIFF ON COUNT II ONLY AND PROCEED DIRECTLY TO QUESTION (4b).

The jury appropriately did not respond to this interrogatory. Interrogatories (4a) and (4b) asked whether the defendant knew that the discharge violated federal and state law, respectively. The jury answered "yes" to both. A. 268-269.

The District Court instructed the jury that an affirmative answer to the second interrogatory was appropriate only if Kelley persuaded the jury that Airborne's decision to discharge him was actually motivated by age animus. A. 1913; 1921; 1922. The District Court did not instruct the jury that it could answer interrogatory number 2 affirmatively based on a finding of pretext.

If the jury had not been convinced that age actually played a determinative role in the decision to discharge based on evidence of age animus, it was compelled to answer the second interrogatory in the negative. It would still have been permitted to find Airborne liable, under the state law instructions, without crediting evidence which had a direct bearing on the issue of age animus. Since the jury did not follow this course, it is impossible to conclude that the jury predicated its finding on pretext alone. The jury's affirmative finding that age was the reason for the discharge makes the business judgment instruction irrelevant.[13]

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[13] Where a jury has evidence bearing directly on the issue of age animus and finds discrimination without relying on an evaluation of the employer's stated reasons for the discharge, the business judgment instruction cannot affect its decision. Similarly, if the record demonstrates that the jury disbelieved the employer's asserted reasons, the business judgment

As discussed already, Airborne's decision not to inform the Court that the jury answered special interrogatories demonstrates that Airborne knows that the premise of its argument (i.e. that the verdict was based on pretext) is unsupported in the record. To recast the jury's answer to special interrogatories in order to make the question of business judgment even relevant presents a serious constitutional problem. To reexamine the facts in that fashion, would deprive Kelley of his Seventh Amendment right to a jury determination. *Gallick v. Baltimore and Ohio Railroad Company*, 372 U.S. 108, 119 (1963)(jury's plausible view of the evidence must be upheld); *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 335, 364 (1962)(generally discussing the high level of deference required to be given to special verdicts under the Seventh Amendment). Conversely, whether the absence of the business judgment instruction constitutes harmless error under the facts of this case presents no constitutional question.

The First Circuit was correct. Inclusion of a business judgment instruction would not have changed the jury's specific finding of age animus.

V. THE QUESTION PRESENTED IS NOT LIKELY TO ARISE IN THE FUTURE.

The First Circuit did not hold that a business judgment instruction should not be given. No District Court has been forbidden from giving such an instruction. Therefore, the question presented by Airborne's petition may never arise again. In fact, history demonstrates that the issue raised by Airborne's petition is not litigated often.

Airborne points out that jury trials have been available in certain discrimination cases since 1977 and in all discrimi-

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instruction cannot be of assistance because in that case the jury is evaluating the veracity of the reasons and not the legitimacy of the decision.

nation cases since 1991. Airborne further points out that for year ended June 30, 1998, there were 21,871 lawsuits commenced in federal district courts pertaining to civil rights claims in private employment settings. It is compelling that in its research, Airborne found only three federal cases aside from the present one which involved review of a district court's decision not to give a business judgment instruction. Two were Eighth Circuit opinions -- the later one merely clarified the holding of the earlier one. The other opinion located by Airborne was an unpublished opinion of the Tenth Circuit. All cases cited by Airborne hold that the absence of a business judgment instruction does not compel reversal and the courts in three of the four cases affirmed the judgment notwithstanding the absence of the business judgment instruction.

The district courts appear to be managing such cases competently and without confusion as to the principles governing employment discrimination law.[14] Certiorari is not warranted.

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[14] Airborne's argument that employers will fear discharging employees because, at a possible discrimination trial, the court might not give a business judgment instruction artificially credits employers with an awareness of the minute details of employment discrimination trial practice and thus is without merit.

CONCLUSION

For the reasons set forth above, the respondent, John Michael Kelley, respectfully requests that Airborne's Petition for Writ of Certiorari be **DENIED**.

Respectfully submitted,

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ADDENDUM

X. PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

A. **General.** FRAP Rules 40 and 35 should be consulted with respect to the procedures. Petitions for rehearing are intended to bring to the attention of the panel claimed errors in the opinion and they are not to be used for reargument of an issue previously presented.

B. **No Response.** No response is to be filed unless so requested by the Court.

C. **En Banc Processing.** When the petition contains a suggestion for a rehearing en banc, it is submitted by the Clerk to the panel that heard the case and to the other active First Circuit judges. The panel usually first acts as a panel and then the other judges have one week after notification of the panel action to indicate that en banc hearing is desired. The panel's decision and the decision on the en banc suggestion may be issued by separate orders or together as one order. A suggestion for rehearing en banc will also be treated as a petition for rehearing before the original panel. See Local Rule 35.

D. **Vacation of Previous Opinion and Judgment.** Usually when an en banc rehearing is granted, the previous opinion and judgment will be vacated.

Effective January 1, 1992.